

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK E. HUDDLESTON

Claimant

VS.

ADVANTAGE TEMPORARY SERVICES

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 196,091

ORDER

Respondent and its insurance carrier requested review of the Award dated July 25, 1996, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on May 6, 1997.

APPEARANCES

Timothy J. King of Wichita, Kansas, appeared for the claimant. Michael D. Streit of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for an 84 percent work disability. Respondent and its insurance carrier requested the Appeals Board to review the issue of nature and extent of disability. That is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire the record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be affirmed.

Claimant injured his back while working for the respondent on October 10, 1994. At the time of the accident, claimant was forming curb and gutter from wet concrete.

Claimant obtained medical treatment from Broadway Occupational Medicine Clinic from October 18, 1994, through November 28, 1994, at which time R. Burnley White, M.D., released claimant to return to work with temporary restrictions of no lifting greater than 30 pounds. Dr. White, who is board certified in family practice, diagnosed claimant's condition as a lumbar sprain and lumbar disc problem.

Board-certified orthopedic surgeon Robert L. Eyster, M.D., examined claimant on December 13, 1994. Dr. Eyster initially diagnosed degenerative disc disease and possible disc protrusion at the L5-S1 intervertebral space. However, after reviewing the results of a CT scan and myelogram, both of which were negative for a protruding disc, the doctor concluded claimant did not have a herniated disc. On January 17, 1995, Dr. Eyster released claimant to return to work four hours per day and gradually work into eight hours.

Without authorization from the respondent or its insurance carrier, claimant consulted orthopedic surgeon Michael P. Estivo, D.O. Dr. Estivo saw and examined claimant on November 3, 1994, and found claimant had radiculopathy in both legs, the right greater than the left. Dr. Estivo ordered an MRI of the lumbar spine and nerve conduction tests. The radiologist's MRI report indicated claimant had a herniated disc at the L5-S1 intervertebral space which was central and to the right. After several more visits and after performing a discogram, Dr. Estivo operated on claimant's low back in March 1995 at which time he found a significant protruding disc which was impinging upon the nerve root even more so than the MRI had indicated.

Respondent and its insurance carrier contend the surgery was unnecessary. Further, the respondent and its insurance carrier contend any medical restrictions which claimant should now observe are related to the unwarranted surgery rather than claimant's alleged work-related injury. Respondent argues Dr. Estivo's operative notes cannot be believed because physicians regularly falsify their records to justify any surgery which they perform and also to support their earlier diagnosis. Respondent presented Dr. Eyster's testimony in support of that contention.

The Appeals Board finds the greater weight of the evidence establishes that claimant did sustain a herniated disc as a result of the October 10, 1994, accident. That conclusion is based upon claimant's pre-surgery symptoms as well as Dr. Estivo's operative findings which the Appeals Board finds to be credible.

The computation of claimant's permanent partial general disability benefits is governed by K.S.A. 44-510e which provides, in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Based upon Dr. Estivo's testimony, the Administrative Law Judge found that claimant had a tasks loss of 68 percent and a 100 percent difference in pre- and post-injury earnings. Averaging those percentages the Administrative Law Judge found claimant had an 84 percent permanent partial general disability for which he was entitled to receive benefits. The Appeals Board agrees with that analysis and conclusion. Dr. Estivo was the only doctor to testify concerning claimant's tasks loss caused by the herniated disc. The Appeals Board finds Dr. Estivo's tasks loss opinion to be persuasive. Likewise, because claimant has been unable to obtain employment despite his efforts, there exists a 100 percent difference in the pre- and post-injury average weekly wage.

When considering the entire the record, the Appeals Board finds claimant has sustained an 84 percent permanent partial general disability as a result of the October 10, 1994, accident for which he is entitled to receive workers compensation benefits. Should claimant find employment either through his own efforts or through vocational rehabilitation services provided by the respondent and its insurance carrier, the parties may request review and modification to adjust the Award accordingly.

The Appeals Board hereby adopts the findings and conclusions of the Administrative Law Judge as set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated July 25, 1996, entered by Administrative Law Judge John D. Clark should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy J. King, Wichita, KS
Michael D. Streit, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director